

# VIRGINIA ASSOCIATION OF COUNTIES



CONNECTING COUNTY GOVERNMENTS SINCE 1934

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## Executive Director

James D. Campbell, CAE

## General Counsel

C. Flippo Hicks

October 29, 1997

Mr. William F. Caton, Acting Secretary  
Office of the Secretary, Room 222  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

RECEIVED

OCT 30 1997

FCC MAIL ROOM

Re: Federal Communications Commission Rule Making  
(Docket No. 97-182)

Dear Mr. Caton:

I am writing to convey the opposition of the Virginia Association of Counties to the above-referenced proposed rule making which would preempt local and state government authority in siting, placement and construction of broadcast transmission facilities as well as any other preemption of local and state land use and right of way management authority. We disagree with the assumption by the FCC and by the broadcast industry that an accelerated roll-out of digital television is so critical that it should virtually eliminate the local controls that Congress had preserved for localities in the 1996 Telecommunications Act.

Essentially, our three major concerns with the proposed FCC rule making can be summarized as follows:

- 1) The 21 to 45 day time limit is not enough time for any routine action to go through the normal process of a county Planning Commission Public Hearing and a county Board of Supervisors public hearing, much less an action of the magnitude being considered by the FCC. The proposed limit does not even allow adequate time for statutorily mandated notice requirements to adjacent landowners and the general public.
- 2) The FCC rule would preempt considerations such as aesthetics, property values, and environmental issues entirely. Even acting within the time constraints proposed in the rule making, the FCC would preempt all local zoning and building permit requirements unless a local government could demonstrate the requirement was reasonable in order to meet health or safety objectives.
- 3) Any broadcaster unhappy with a local decision could appeal directly to the FCC, rather than going through the court system which is the current practice. County governments would be required to defend themselves at the FCC in Washington rather than in local, state, or federal courts.

Enclosed are comments from twenty-five of Virginia's counties, many of which have been communicated to you directly, which outline in greater detail the effect that the proposed rule making will have on their particular locality.

1001 East Broad Street  
Suite LL 20  
Richmond, Virginia  
23219-1928

(804) 788-6652  
FAX (804) 788-0083

E-mail: VACo95@aol.com

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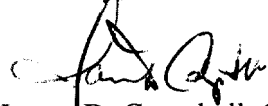


Mr. William F. Caton, Acting Secretary  
October 29, 1997  
Page Two

We are also enclosing a press release and comments that have been forwarded to us by the Aircraft Owners and Pilots Association, whose members oppose the rule making on the grounds that preemption of state and local zoning laws, ordinances and regulations will result in new hazards to aerial operations, aircraft, and passengers in the United States.

Thank you for allowing me to address the Virginia Association of Counties' concerns. Should you need additional information or would like to discuss this further, please do not hesitate to contact me or Ellen Davenport of my staff.

Sincerely,

A handwritten signature in black ink, appearing to read "James D. Campbell".

James D. Campbell, CAE  
Executive Director

---

**Comments from Virginia's Counties  
Federal Communications Commission Rule Making,  
Docket No. 97-182**

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Accomack  
Albemarle  
Alleghany  
Bath  
Botetourt  
Chesterfield  
Culpeper  
Cumberland  
Essex  
Fairfax  
Franklin  
Gloucester  
Halifax  
Henrico  
Isle of Wight  
Lancaster  
Mecklenburg  
Middlesex  
Montgomery  
Northampton  
Roanoke  
Shenandoah  
Tazewell  
Westmoreland  
York



R. Keith Bull  
County Administrator

COUNTY OF ACCOMACK  
OFFICE OF THE COUNTY ADMINISTRATOR

23296 COURTHOUSE AVE.

ROOM 203

P. O. BOX 388

ACCOMACK, VIRGINIA 23301

(757) 787-5700

(757) 824-5444

(757) 787-2468 FAX

RECEIVED

OCT 30 1997

October 28, 1997

FCC MAIL ROOM

Mr. William F. Caton, Acting Secretary  
Office of Secretary, Room 222  
Federal Communications Commission  
1919 M. Street, NW  
Washington, D.C. 20544

**Re: FCC Rulemaking Docket 97-182  
Preemption of Local Zoning over Television  
& Radio Broadcasting Towers**

Dear Mr. Caton:

The FCC Proposal to Preempt local Zoning Authority over Television and Radio, Broadcast Towers, if approved, will have severe negative impacts on Accomack County and other local governments. The County of Accomack is on a major flyway along the East Coast, with a public airport, a NASA Airport and Flight Facilities, and many private airstrips located throughout the county. In addition there are projects under way for major facilities such as the Virginia Commercial Space Port that could be severely impacted by the inappropriate location of a tower. Commercial towers should be located through a local process which recognizes the location of both existing and planned facilities that may be impacted by tower placements in their vicinity. The Accomack County Board of Supervisors strongly objects to any action by the FCC which would preempt local zoning authority over television and radio broadcast towers.

Sincerely,

A handwritten signature in dark ink, appearing to read "R. Keith Bull".

R. Keith Bull  
County Administrator

RKB:ssb

Copy to: Jim Campbell, VACo



David P. Bowerman  
Rio  
Charlotte Y. Humphris  
Jack Jouett  
Forrest R. Marshall, Jr.  
Scottsville

COUNTY OF ALBEMARLE  
Office of Board of Supervisors  
401 McIntire Road  
Charlottesville, Virginia 22902-4596  
(804) 296-5843 FAX (804) 296-5800

Charles S. Martin  
Rivanna  
Walter F. Perkins  
White Hall  
Sally H. Thomas  
Samuel Miller

FAX: (804) 296-5800

October 20, 1997

Office of the Secretary  
Federal Communications Commission  
Washington, D. C. 20554

Dear Sir or Madam:

On behalf of the Albemarle County, Virginia Board of Supervisors, I would like to take this opportunity to provide comment on the FCC's notice of proposed rule making on preemption of state and local zoning and land use restrictions on the siting, placement and construction of broadcast station transmission facilities, (Docket #97-182, FCC 97-296). Let me begin by pointing out that the very introduction of the NPRM states that "The Commission is undertaking this proceeding to consider whether and in what circumstances to preempt certain state and local zoning and land use ordinances which present an obstacle to the rapid implementation of digital television (DTV) service. To consider circumventing the basic rights guaranteed in our representative political process by allowing the FCC and private industry to dictate to the citizens of this country where DTV towers should be placed is unthinkable. To consider removing local government from the decision-making process on tower location surely flies in the face of the principles upon which a democracy is based.

As I understand the proposed rule, it will require local governments to act on all zoning and building permit requests for broadcast tower construction in the unreasonable time limit of 21 to 45 days, which completely ignores current local procedures, legal public notice requirements, and other public policy interests on zoning requests. To suggest the failure to act on the zoning and building permit requests within this limited time constraint would cause the request to be automatically granted is again most unreasonable. Other issues that have become a part of our review procedure for the location of towers in Albemarle County cannot be dealt with at the local level if we are preempted in any fashion simply in the interest of rapid implementation of digital TV. The NPRM goes on to allow any broadcaster unhappy with a local decision to appeal directly to the FCC rather than going to our court system which is the current practice. This would require county government to defend itself at the FCC in Washington rather than in the local, state or federal courts having jurisdiction at the present.

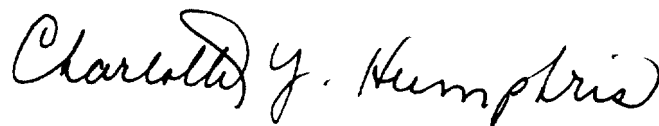


Office of the Secretary  
Federal Communications Commission  
October 20, 1997  
Page 2

Albemarle County has, with citizen input, instituted a most reasonable review procedure at the local level for all towers within our community in light of other telecommunication rule making. To remove this siting decision from citizens at the local level who must live in the shadows of these towers would be an unfortunate reversal of the stated policy of this Congress to return power back to the states and local government. By taking this power away from localities, the federal government is, in effect, enforcing yet another federal mandate.

The Albemarle County Board of Supervisors is firmly on record against the preemption of local land use decisions by any governmental entity other than the local representatives charged with the health, safety and welfare of the communities in which they live. We strongly oppose this proposed rule making and urge the FCC to reconsider any proposed rule that, in the interest of rapid implementation of digital television service, would preempt local governments' ability to review and act upon the location of such towers in the interest of the health, safety and welfare of our citizens.

Sincerely,



Charlotte Y. Humphris  
Chairman

CYH/dbm  
97.026

cc: The Honorable Charles S. Robb  
The Honorable John W. Warner, Jr.  
The Honorable Thomas J. Bliley, Jr.  
The Honorable Virgil H. Goode, Jr.  
✓ Virginia Association of Counties  
National Association of Counties

October 27, 1997



## County of Alleghany

COUNTY ADMINISTRATION BUILDING  
110 ROSEDALE AVENUE  
COVINGTON, VIRGINIA 24426

Larry E. Naake  
Executive Director  
National Association of Counties  
440 First Street, NW  
Washington, DC 20001-2080

Dear Mr. Naake:

At their October 21, 1997 meeting, the Alleghany County Board of Supervisors unanimously opposed any change in the FCC regulations that would exempt broadcast towers from local zoning. Local governments have diligently and, in many cases, painfully established zoning that prohibited many activities from areas because the elected officials felt such restrictions were in the best interest of all citizens. With no restrictions, such diligence will be spiked with inconsistencies that surely will have an impact on the jurisdiction's master plans.

If I might give an example, not specifically related, but to explain a feeling of concern. Alleghany County recently moved its Registrar's office approximately two blocks in order to free space for an eventual communication system that would be expanded to include the E911 system. One of the criteria in the moving is that information must be given to the Department of Justice for this agency to review and respond to the suitability of the new location. Approximately four days prior to the mandatory time that the Federal Government had to review the plan, the County received a call asking for information about the new location inquiring as to "what state is the County in?" This event was not pre-fabricated and is documented. As you can see, there is concern with the familiarity of an area by an individual who may have no knowledge as to the specifics of locating a tower in an area.

Your concerns in this matter is greatly appreciated. If you have any questions, please do not hesitate to contact me (540) 965-1600.

Sincerely,

Eston E. Burge  
County Administrator

EEB/cbj

c: Alleghany County Board of Supervisors  
✓ James D. Campbell, VACo Executive Director  
R. Michael Amyx, VML Executive Director

Eston E. Burge  
County Administrator  
P. O. Box 917  
Covington, VA 24426-0917  
540/965-1600 • FAX: 540/965-1606

### BOARD OF SUPERVISORS

E. C. Dressler  
Covington District

Stephen A. Bennett  
Jackson River District

G. Alan Howard  
Boiling Springs District

Rickey D. May  
Falling Spring District

Cletus W. Nicely  
Clifton District



## *County of Bath*

CLAIRE A. COLLINS  
County Administrator  
P.O. BOX 309  
WARM SPRINGS, VIRGINIA 24484  
(540) 839-7221  
(540) 839-7222 FAX

October 28, 1997

William F. Caton, Acting Secretary  
Office of the Secretary, Room 222  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

Re: Ex Parte Letter Re: Cases WT 97-197, MM Docket 97-182,  
and DA 96-2140

Dear Mr. Caton:

We are writing you concerning the Federal Communications Commission's attempts to preempt local zoning of cellular, radio and TV towers by making the FCC the "Federal Zoning Commission" for all cellular telephone and broadcast towers. Congress and the courts have long recognized zoning as a local function. We would appreciate the FCC halting these efforts which violate the intent of Congress, the Constitution and principles of Federalism.

In the 1996 Telecommunications Act, Congress expressly reaffirmed local zoning authority over cellular towers and informed the FCC to stop all rulemakings where the FCC was attempting to become a Federal Zoning Commission for such towers. Despite this instruction from Congress, the FCC is now attempting to preempt local zoning authority in the following three different rulemakings:

1) Cellular Towers - Radiation: Congress expressly preserved local zoning authority over cellular towers in the 1996 Telecommunications Act with the sole exception that municipalities cannot regulate the radiation from cellular antennas if it is within limits set by the FCC. The FCC now is attempting to use the limited authority Congress gave over cellular tower radiation to review and reverse any cellular zoning decision in the U.S. which may be tainted by radiation concerns. If any citizen raises an issue regarding radiation, the FCC believes this is sufficient basis for a cellular zoning decision to immediately be taken over by the FCC and potentially reversed, even if the



Page Two

Federal Communications Commission

October 28, 1987

2) Cellular Towers - Moratoria: The FCC also is proposing a rule banning the moratoria imposed by some localities on cellular towers while the localities revise their zoning ordinances to accommodate the increase in numbers of these towers. This violates the Constitution and directive from Congress preventing the FCC from becoming a Federal Zoning Commission.

3) Radio/TV Towers: The FCC's proposed rule on radio and TV towers sets an artificial limit of 21 to 45 days for local governments to act on any local permit (environmental, building permit, zoning or other). Any permit request is automatically granted if the locality does not act within this timeframe. No provisions have been granted for incomplete applications or violations of local law. This proposed rule would prevent localities from considering impacts towers have on safety, property values, the environment and/or aesthetics. All appeals of zoning and permit denials would go to the FCC and not to local courts as has been past procedure.

Since broadcast towers are some of the tallest structures in the world, the FCC claims these changes are needed to allow TV stations to switch to High Definition Television. Unfortunately, the current schedule will not be met and should be revised to address the concerns of local governments and citizens.

We oppose any effort to grant the FCC the power to act as a "Federal Zoning Commission" and preempt local zoning authority. Local policy makers are best suited to make these decisions for the health, safety and welfare of local residents.

Please take the necessary actions to terminate all these proceedings.

Sincerely,



Claire A. Collins  
County Administrator

sr

cc: Representative Tom Billey  
Representative Bob Goodlatte  
Representative James Moran  
Mr. Robert Fogel, National Association of Counties



W.G. LOOPE, Chairman  
E.O. SHIFLETT, Vice-Chairman  
R.E. LAYMAN, JR.  
BONNIE B. MAYO  
WANDA C. WINGO

## *Botetourt County Board of Supervisors*

GERALD A. BURGESS  
COUNTY ADMINISTRATOR  
PHONE (540) 473-8223  
FAX (540) 473-8207  
1 WEST MAIN STREET-BOX 1  
FINCASTLE, VIRGINIA 24090

October 28, 1997

William F. Caton, Acting Secretary  
Office of the Secretary  
Federal Communications Commission, Rm. 222  
1919 M Street, NW  
Washington, D.C. 20554

Dear Mr. Caton:

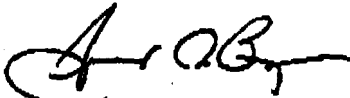
This letter concerns the Federal Communications Commission's notice of proposed rule making (MM Docket No. 97-182) which would effectively preempt local zoning authority over television and radio broadcast towers. Botetourt County adamantly and vigorously opposes this federal preemption of local zoning and land use authority over the siting, placement and construction of broadcast station transmission facilities, for numerous reasons including, but not limited to, the following:

- Approval of this rule would preempt all local zoning authority and building permit requirements over the siting and construction of towers unless a local government could demonstrate the requirement was reasonable in order to meet health or safety objectives. There are many other local concerns that should be considered.
- The time limits requiring local governments to act on requests for towers are unrealistic and do not take into consideration the procedural requirements of state and local law.
- Appellants could appeal any local decision to the FCC rather than going through the court system that is usual for any other local development issue.

William F. Caton  
October 28, 1997  
page 2

A copy of the Botetourt County Board of Supervisor's official action taken on October 21, 1997 to oppose this proposed rule making is enclosed. By way of copy of this correspondence and the record of the Board of Supervisor's action we are notifying the National Association of Counties, the Virginia Association of Counties, and all appropriate elected officials of this opposition and requesting that they likewise vigorously oppose this unprecedented assault on the very heart of local land use and regulatory authority.

Sincerely,



Gerald A. Burgess  
County Administrator

C:

The Honorable Charles S. Robb, U.S. Senator  
The Honorable John W. Warner, U.S. Senator  
The Honorable Robert W. Goodlatte, U.S. Representative, 6th District  
The Honorable Malfourd W. Trumbo, VA Senator, 22<sup>nd</sup> District  
The Honorable C. Richard Cranwell, VA House of Delegates, 14<sup>th</sup> District  
The Honorable R. Creigh Deeds, VA House of Delegates, 18<sup>th</sup> District  
The Honorable Lacey E. Putney, VA House of Delegates, 19<sup>th</sup> District  
National Association of Counties  
Virginia Association of Counties  
Botetourt County Board of Supervisors  
Botetourt County Planning Commission  
Fifth Planning District Commission

enclosure

Stevenson.doc-3132.



W.G. LOOPE, Chairman  
E.O. SHIFLETT, Vice-Chairman  
R.E. LAYMAN, JR.  
BONNIE B. MAYO  
WANDA C. WINGO

## *Botetourt County Board of Supervisors*

GERALD A. BURGESS  
COUNTY ADMINISTRATOR  
PHONE (540) 473-8223  
FAX (540) 473-8207  
1 WEST MAIN STREET, BOX 1  
FINCASTLE, VIRGINIA 24090

The regular meeting of the Botetourt County Board of Supervisors was held on Tuesday, October 21, 1997, in the County Board Meeting Room, Old General District Courthouse, Fincastle, Virginia, beginning at 9:00 A. M.

**PRESENT: Members:** Mr. William G. Loope, Chairman  
Mr. E. O. Shiflett, Vice-Chairman  
Mr. Robert E. Layman, Jr.  
Mrs. Bonnie B. Mayo  
Mrs. Wanda C. Wingo

**ABSENT: Members:** None

After further discussion, on motion by Mrs. Wingo, and carried unanimously, the Board directed the County Administrator to notify the Federal Communications Commission of Botetourt County's opposition to the proposed rule making, and urged the Virginia Association of Counties, the National Association of Counties, and our elected officials to vigorously oppose this rule making which would preempt local zoning authority over television and radio broadcast towers. (Resolution Number 97-10-15)

A Copy TESTE:

Mr. Gerald A. Burgess  
County Administrator

**BOARD OF SUPERVISORS**

**ARTHUR S. WARREN**  
CHAIRMAN  
CLOVER HILL DISTRICT

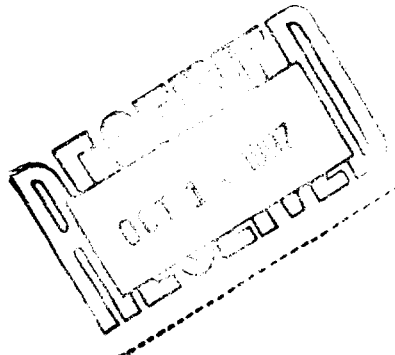
**RENNY BUSH HUMPHREY**  
VICE CHAIRMAN  
MATOACA DISTRICT

**J. L. McHALE, III**  
BERMUDA DISTRICT

**HARRY G. DANIEL**  
DALE DISTRICT

**EDWARD B. BARBER**  
MIDLOTHIAN DISTRICT

**CHESTERFIELD COUNTY**  
P.O. Box 40  
CHESTERFIELD, VIRGINIA 23832-0040



**LANE B. RAMSEY**  
COUNTY ADMINISTRATOR

October 9, 1997

Ms. Ellen Davenport  
Virginia Association of Counties  
1001 E. Broad Street, Suite LL 20  
Richmond, Virginia 23219-1928

**Subject:** Response to the FCC notice of proposed rule making in the matter of preemption of State and Local zoning and land use restrictions on the siting, placement and construction of broadcast station transmission facilities (FCC 97-296/MM Docket No. 97-182)

Dear Ms. Davenport:

Upon reviewing the notice of proposed rule making referenced above, the Chesterfield County Planning Department opposes the preemption of local zoning and land use authority on the siting, placement and construction of broadcast station transmission towers and associated tower-mounted or ground-mounted equipment. The only exceptions could be the proposed preemptions of local regulation of RF emissions and frequency interference. In these two (2) matters, the County has traditionally deferred to regulations promulgated by the FCC.

The exercise of local zoning authority in Chesterfield County, over communications towers and associated equipment, has benefitted both the public and the communications industry. Since 1990, our locality has reviewed at least thirty-seven (37) zoning applications for radio, television, and cellular/PCS communications tower locations. Through the zoning process, concerns about the compatibility of these towers with existing and anticipated area development were raised and, for at least thirty-one (31) tower applications, these concerns were adequately addressed and the towers approved. In five (5) instances, the applications for cellular/PCS towers were withdrawn because of opposition. In all five (5) instances, alternate sites were found and ultimately approved. In only one (1) instance was a tower application, for a cellular communications tower site, denied by Chesterfield County.

Our jurisdiction works closely with the communications industry to find tower sites and process

zoning applications in an expeditious manner. However, shortening the process, to as little as twenty-one (21) days as proposed, would greatly hamper our ability to assist the industry and serve the public. The normal zoning time-line is designed to give the applicant, staff, citizens, the Planning Commission and the Board of Supervisors sufficient time to review a zoning proposal. Any deviation from the normal process would entail certain risks to the applicant and additional costs to the County. In particular, 'rushing' cases through the zoning process could result in: mistakes in advertising, posting, and notification; insufficient time for staff, the Commission and the Board to analyze the request and anticipate, identify and address potential concerns and problems; massive opposition to the request at the public hearing level, including charges from citizens that the tower proposal is being 'rammed down our throats'; significant additional costs to the County in overtime, advertising, interruption of normal work flow, and duplication of effort in handling tower applications as special cases; more frequent denials of tower requests; and the possible need to amend our laws and ordinances relative to notification and advertising. In addition, allowing a tower applicant to appeal the denial of a tower zoning application to the FCC, or allowing an applicant to take the denial to arbitration, would give the FCC authority to overturn a local zoning decision. Under these circumstances, the County would have to go through the time, effort and expense of defending our decision before the FCC, as opposed to defending our decision at the local level through the courts, in the normal manner or such cases.

Currently Chesterfield County, through the zoning process, addresses the lighting, color and appearance of a tower and tower-mounted equipment, as well as other aesthetic concerns such as screening ground mounted equipment, architectural treatment of buildings, buffers, landscaping, signage, tower design, and tower removal when the structure is no longer used for communications purposes. The County has also adopted guidelines for the siting of proposed towers. These guidelines address concerns raised by our citizens about locating towers near residential neighborhoods and high visibility areas, such as along our rivers. The adopted policies recognize the need for communications towers and, far from excluding towers from any area in the County, are designed to accommodate them while mitigating their visual impacts. The proposed preemption would remove consideration of these concerns from the approval or denial of tower zoning requests.

Adoption by the FCC of the proposed rule making referenced herein would strip Chesterfield County of virtually all zoning authority to regulate towers as a discrete land use. Clearly, this preemption would not serve the best interests of the citizens of this County who, while having an interest in affordable, state-of-the-art communications technology, also have a strong, vested interest in the economic and aesthetic impacts that communications towers may have on their homes and neighborhoods.

Sincerely,

A handwritten signature in black ink, appearing to read 'Thomas E. Jacobson', written in a cursive style.

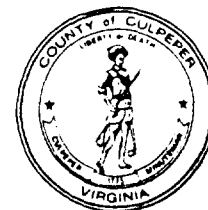
Thomas E. Jacobson, AICP  
Director of Planning

OFFICE OF  
COUNTY ATTORNEY

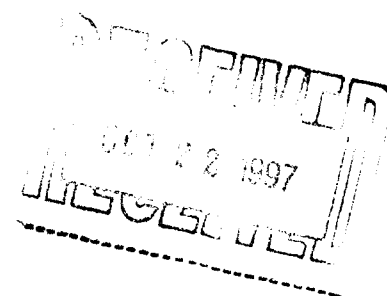
(540) 825-5179  
Fax: (540) 825-1677  
Direct Fax: (540) 829-2186

COUNTY OF CULPEPER

302 North Main Street  
Culpeper, Virginia 22701



October 20, 1997



Office of the Secretary  
Federal Communications Commission  
Washington, D.C. 20554

**Re: Notice of Proposed Rule Making, MM Docket No. 97-182**

Dear Sir/Madam:

I write to comment on the above-referenced NPRM, which I oppose as County Attorney and Legislative Liaison for Culpeper County, Virginia, for the following reasons:

1. Local zoning authorities, not a federal agency, are better suited to determine on a case-by-case basis the appropriateness of the location of a telecommunications broadcast tower. Zoning and land use determinations are traditionally and appropriately a matter of local concern. No federal agency can set standards for every conceivable local situation.
2. The time limits set forth in the proposed rule are shockingly unrealistic and improper.
  - A. Under Virginia law, zoning determinations must be made after reference of the matter to the local planning commission, which makes a recommendation to the governing body after a public hearing. The governing body then makes a determination after its own public hearing. In Culpeper, each meets once a month. Before consideration, applications must be reviewed by local staff and various state agencies. It would be impossible to meet the deadlines set forth in the proposed rule on zoning determinations. Given the many considerations that make up informed legislative zoning determinations, Virginia law allows up to one year to make such determinations. As a practical matter in Culpeper County, however, most zoning determinations are made within 90 to 120 days.
  - B. Under Virginia law, site plan and subdivision determinations are required to be made within 60 days from application. If they are not determined in a timely manner, they are deemed approved. As site plan and subdivision reviews are ministerial and not legislative, the Virginia legislature has already set time limits which are appropriate and reasonable.

- C. As a good example of why the time limits in the proposed rule are unreasonable, I submit the following. I received notice of this NPRM on October 10, 1997. The next scheduled meeting of my Board of Supervisors is November 5, 1997. The next meeting of the Planning Commission is November 12, 1997. If the notice I received of the NPRM had been a site plan application to modify existing broadcast transmission facilities, it would have been impossible to meet the proposed rule's time limit of 21 days to make a final determination on the application. A decision would be made approximately 60 days later. If the notice had been an application for rezoning for a new facility, given the legal requirements for public hearings before the Planning Commission and the Board of Supervisors, the earliest the application could be granted -- assuming timely state and local agency review and a complete application with no issues which required further time for inquiry -- would have been approximately 90 days later, in January of 1998.
3. The proposed rule's preemption is over broad as to the localities affected. The driving purpose behind the proposed rule is to allow timely development of digital television ("DTV") in certain top markets. Networks in the top ten markets must be on the air with DTV by May 1, 1999. Networks in the next ten markets must follow suit by November 1, 1999. I question the need for preemption and an expedited review, even in these localities in Virginia, given the time limits already in place. However, this is especially true in smaller localities without an expedited schedule, where no reason exists why an expedited review or preemption could be important.
  4. The proposed rule's preemption is over broad as to types of facilities affected. Again, the proposed rule would be intended to expedite development of DTV. However, the proposed rule would preempt zoning controls over every type of broadcast antenna, whether involved in DTV or not. Control over the location of radio towers is even affected. This is significant to a community like Culpeper County, which has few, if any, TV towers, but many other types of towers, such as radio and cellular.
  5. The proposed rule is "overkill" and assumes the worst of local governments. Problems in meeting the proposed DTV roll-out schedule due to a few possible zoning or land use related delays could be more easily addressed by case-by-case extensions in the FCC schedule, rather than turning well-settled zoning and land use laws on their head, setting up contradictory zoning review procedures, and requiring procedures which would be illegal under existing Virginia law.
  6. The proposed rule inappropriately gives a preference to broadcast companies over every other company or landowner which must comply with zoning requirements in localities. All companies or individuals with a proposed development or land use, not just broadcast companies, have deadlines to meet and must comply with the same laws regarding zoning and land use. The proposed rule would move broadcasters to the head of the line and give this specific industry an inappropriate advantage. Far from seeking "equal treatment," the broadcast industry is seeking an undue advantage which Congress did not intend in the Telecommunications Act of 1996.



7. The proposed rule sends appeals of zoning determinations to alternate dispute resolution or the FCC, rather than the state courts, which have experience and demonstrated ability in the area of local zoning regulation. It forces a locality such as Culpeper County to defend its interests before a federal agency rather than in a local court. Companies that seek to do business in a locality should expect to have its local zoning and land use disputes with that locality resolved in that locality, rather than before a federal agency. From a due process perspective, the company could reasonably anticipate suit in the locality, but the locality does not reasonably expect to litigate local land use matters -- which locality did not invite or institute -- in Washington, D.C. before a federal agency.
8. Culpeper County has not had any complaints from tower owners regarding the time it takes to resolve siting issues. In the last several years, no zoning request for a tower siting has taken longer than 120 to 150 days. The average such request takes 90 days from the date of application. Site plans and subdivision plats are reviewed and a decision rendered within approximately 60 days, as provided by state law. Significantly, no application for a rezoning or site plan to allow the construction of a tower has been denied. There are no glaring problems or impediments to DTV implementation in Culpeper County which need correction by the proposed rule.

While this is my comment as County Attorney and Legislative Liaison for Culpeper County, Virginia, it is consistent with positions taken in the past by my Board of Supervisors. My Board was unable to take a formal position, given the 21 days left in the comment period when we received notice of the proposed rule.

If you have any questions, please do not hesitate to call.

Sincerely yours,



Andrew R. McRoberts

County Attorney and Legislative Liaison

ARM/s

cc: Board of Supervisors  
Steve Miner, County Administrator  
John Egertson, AICP, Planning Director  
Aubrey Rozell, Zoning Administrator  
Jim Campbell, Executive Director, VACo  
Larry Naake, Executive Director, NACo

# County of Cumberland

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BOARD OF SUPERVISORS  
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COUNTY ATTORNEY  
DARVIN E. SATTERWHITE

October 28, 1997

Senator Warner  
Senator Robb  
Congressman Goode

Dear Senator Warner, Senator Robb, and Congressman Goode:

The Cumberland County Board of Supervisors respectfully requests that Congress take immediate steps to reign in the Federal Communications Commission and its attempts to preempt local zoning of cellular, radio and TV towers by making the FCC the "Federal Zoning Commission" for all cellular telephone and broadcast towers. Congress and the courts have long recognized that zoning is a peculiarly local function. However, the proposed rules by the FCC are in direct contradiction with the intent of Congress, the Constitution and principles of Federalism.

In the 1996 Telecommunications Act, Congress expressly reaffirmed local zoning authority over cellular towers. It told the FCC to stop all rulemakings where the FCC was attempting to become a Federal Zoning Commission for such towers. Despite this instruction from Congress, the FCC is now attempting to preempt local zoning authority in three different rulemakings.

Cellular Towers - Radiation: Congress expressly preserved local zoning authority over cellular towers in the 1996 Telecommunications Act with the sole exception that municipalities cannot regulate the radiation from cellular antennas if it is within limits set by the FCC. The FCC is attempting to have the "exception swallow the rule" by using the limited authority Congress gave it over cellular tower radiation to review and reverse any cellular zoning decision in the U.S. which it finds is "tainted" by radiation concerns, even if the decision is otherwise perfectly permissible. In fact, the FCC is saying that it can "second guess" what the true reasons for a municipality's decision are, need not be bound by the stated reasons given by a municipality and doesn't even need to wait until a local planning decision is final before the FCC acts.

Some citizens are concerned about the radiation from cellular towers, and certainly we cannot prevent them from mentioning their concerns during public meetings. However, in its rulemaking, the FCC indicates that if any citizen raises this issue, then this is sufficient basis for a cellular zoning

decision to immediately be taken over by the FCC and potentially reversed, even if the municipality expressly says it is not considering such statements and the decision is completely valid on other grounds, such as the impact of the tower on property values or aesthetics.

Cellular Towers - Moratoria: Relatedly the FCC is proposing a rule banning the moratoria that some municipalities impose on cellular towers while they revise their zoning ordinances to accommodate the increase in the numbers of these towers. Again, the FCC is seeking to thwart the will of Congress and take zoning authority away from local government.

Radio/TV Towers: The FCC's proposed rule on radio and TV towers is also a poor approach. It sets an artificial limit of 21 to 45 days for municipalities to act on any local permit (environmental, building permit, zoning or other). Any permit request is automatically deemed granted if the municipality doesn't act in this timeframe, even if the application is incomplete or clearly violates local law. And the FCC's proposed rule would prevent municipalities from considering the impacts such towers have on property values, the environment or aesthetics. Even safety requirements could be overridden by the FCC! And, in a unique power grab, all appeals of zoning and permit denials would go to the FCC, not to the local courts.

The FCC claims these changes are needed to allow TV stations to switch to High Definition Television quickly. But *The Wall Street Journal* and trade magazines state there is no way the FCC and broadcasters will meet the current schedule, so there is no need to violate the rights of municipalities and their residents just to meet an artificial deadline.

Please do three things to stop the FCC: First, write new FCC Chairman William Kennard and FCC Commissioners Susan Ness, Harold Furchtgott-Roth, Michael Powell and Gloria Tristani telling them to stop this intrusion on local zoning authority in cases WT 97-197, MM Docket 97-182 and DA 96-2140; second, join in the "Dear Colleague Letter" currently being prepared to go to the FCC from many members of Congress; and third, oppose any effort by Congress to grant the FCC the power to act as a "Federal Zoning Commission" and preempt local zoning authority. I also suggest you speak with Robert Fogel at the National Association of Counties, 202-393-6226.

Sincerely,



John S. Bailey  
County Administrator

cc: William F. Caton, FCC Acting Secretary

10/28/97

12:22

804 443 4157

ESSEX CO. ADMIN.

001

**R. Gary Allen**  
County Administrator

**Linda E. Lumpkin**  
Assistant County Administrator



Established 1692

**Essex County**  
Virginia

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October 28, 1997

Board of Supervisors

**James F. Moore**  
Greater Tappahannock  
Election District

**Angelo S. Stevens**  
North Election District

**Robert S. Handly**  
Central Election District

**Margaret H. Davis**  
South Election District

**William F. Caton, Acting Secretary**  
Office of the Secretary, Room 222  
Federal Communications Commission  
1010 M Street, N.W.  
Washington, D.C. 20554

Dear Mr. Caton:

The Essex County Board of Supervisors voted unanimously on October 14, 1997, to oppose your rule making (Docket No. 97-182) as it preempts local zoning authority over television and radio broadcast towers and directed me to notify you of its opposition as you propose unrealistic time limits for local action on tower construction requests, preempt local concerns including aesthetics and environmental issues, and set up the FCC as the authority for appeals as opposed to the courts, where the appeals process rightly belongs.

Very truly yours,

Linda E. Lumpkin  
Assistant County Administrator

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cc: James D. Campbell, VACo  
Ellen Davenport, VACo

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

In the Matter of

Preemption of State and Local                    )  
Zoning and Land Use Restrictions                )  
On the Siting, Placement and                    )     MM Dk. No. 97-182  
Construction of Broadcast                        )  
Transmission Facilities                            )

COMMENTS OF FAIRFAX COUNTY, VIRGINIA

I. INTRODUCTION

The Federal Communications Commission ("Commission"), through this proceeding, seeks comment on whether, or in what circumstances, the Commission may preempt certain state and local zoning and land use ordinances in order to implement the rapid deployment of digital television ("DTV") services. The Commission also asks whether such preemptive authority should extend to other already-deployed broadcast media, such as radio and analog television facilities.

There are two full power broadcast television towers in Fairfax County, Virginia ("County"). WNVC, a non-commercial educational television station, has a tower at the junction of U.S. 29 and I-495, near Merrifield, Va. The present tower is 636 feet high and 705 feet over the average terrain.<sup>1</sup> WVVI, Channel 66 uses a tower on Ox Road in Fairfax Station that is 397 feet high, 551 feet above the average terrain.<sup>2</sup> Both are in the Washington, D.C. Designated Market Area ("DMA"). WVVI, a non-

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<sup>1</sup> Warren Publishing, 65 Cable and Television Factbook A-1368 (1997).

network commercial station, is required to complete construction of its DTV facilities no later than May 1, 2002; WNVC must complete construction by May 1, 2003.<sup>3</sup> Thus, there is plenty of time for applicants to follow normal land use processes which, in the County, are usually measured in months, not years.

Land use regulations in Virginia flow from the police power of the state which, for the most part, is delegated to local governments such as the County. The purpose of these powers is to protect, promote and improve the public health, safety and general welfare.<sup>4</sup> For the Commission to ask whether it should preempt state and local land use authority is for the Commission to presume that it has the power to do so. The Commission does not have the broad authority to usurp so basic a power allocated to the states by our constitutional division of powers.

However, assuming arguendo that the Commission has such broad power, the County submits that it should not be exercised on such inadequate grounds. County residents and businesses may be materially adversely affected by such preemption since the normal protections, the very heart of the police power of the state, would be removed.

The County is concerned that preemption of the County's land use regulation, even for the limited purpose of encouraging deployment of DTV, will deprive the County's residents of any

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<sup>2</sup> Id. At A-1178.

<sup>3</sup> In the Matter of Preemption of State and Local Zoning and Land Use Restrictions On the Siting, Placement and Construction of Broadcast Transmission Facilities, Notice of Proposed Rulemaking, MM Dk. No. 97-182 (released August 19, 1997) ("NPRM") at Par. 2.

<sup>4</sup> See Va. Code Sections 15.1-427, 446.1 and 489 (Michie 1996 Cum. Supp.).

meaningful control over the physical structure and appearance of their communities.

Representatives of the broadcast television and radio industries are asking the Commission to abrogate the preference for localism that is at the heart of FCC public interest regulation. Every other private occupant of real estate within the jurisdiction of the County, whether commercial or residential, must comply with state and local land use laws. Why should the broadcast industries be given an exception from these laws? Just as the Department of Commerce does not attempt to preempt local land use regulations on behalf of manufacturing and production facilities, the Commission should not preempt local land use authority on behalf of the broadcast industry, particularly when the major objection to the exercise of such authority is simply inconvenience.

In light of this, there is no justification for distinguishing between broadcasters and any other person or entity seeking to construct facilities in the County. If anything, the potential size and potential hazards these towers pose make it imperative that local governments ensure that they are structurally sound, placed away from residential areas whenever possible, and collocated with other broadcast antennae. This is necessary to promote the public health, safety and welfare and avoid needless negative economic impact and dangers.<sup>5</sup>

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<sup>5</sup> The dangers to such tall structures include accidental aircraft damage and extreme weather conditions. The location of such towers must consider those possibilities; See, e.g., Reuters, "Parts of Dakotas Declared Federal Disaster Areas," Washington

## II. DISCUSSION

### A. LOCAL LAND USE REGULATION WILL CREATE NO SIGNIFICANT TIME OBSTACLE FOR MOST U.S. BROADCAST TELEVISION STATIONS

Television broadcasters have been on official notice of the digital television rollout deadlines since April 21, 1997. Even the tightest deadline of May 1, 1999, provides those specific commercial stations more than two years to design, seek all necessary government approvals, and construct whatever additional facilities may be required. The jurisdictions in the 11<sup>th</sup>-30<sup>th</sup> DMAs have an additional six months to begin operations. The stations in Fairfax County (WVVI and WNVC) have four to five years for the planning and construction process. To date, no applications to establish DTV facilities have been submitted to the County for approval.

The County shares the Commission's concern that DTV be implemented expeditiously -- the County has a significant interest in the Commission's ultimate redistribution of the analog television spectrum, should the Commission decide to use such recovered spectrum for police, fire, and other public safety uses.<sup>6</sup> Local governments simply have no reason to want to impede

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Post, April 8, 1997, A3 (television transmission tower blown down by high winds).

<sup>6</sup> See *In the Matter of Advanced Television Systems and Their Impact Upon Existing Television Broadcast Services*, MM Dk. No. 87-268, Fifth Report and Order, FCC 97-116 (released April 21, 1997) ("Fifth Report and Order") at Par. 94 (reclaimed analog television spectrum to be distributed to local governments



DTV rollout. In fact, citizens will probably demand quick implementation, especially in Fairfax County.

Nonetheless, the County has a strong interest in protecting the public health, safety, and general welfare of its residents.

Limiting the review period to, at most, one and a half months, when a broadcaster has between two and five years to design and construct its facilities simply is not rationally related to its stated goal of speedy construction. There is no justification to preempt the County's right to ensure that television broadcasters do not endanger the health, safety and welfare of its citizenry and the community's interest in rational economic development and protection from negative economic or safety impacts. One and a half months is also a "one size fits all" mandate for which the federal government has come under criticism. It does not take into account local factors such as the volume of other scheduled activities, the meeting schedules of local entities (i.e., once a month, twice a month), etc.

B. THE PLANNING AND ZONING PROCESS PROTECTS THE PUBLIC INTEREST

1. Zoning and Land Use Regulation Addresses Local Health, Safety and Aesthetic Concerns

The Commonwealth of Virginia has a compelling interest in permitting its localities to create and implement land use plans within their jurisdictions. Virginia Code Section 15.1-427

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agencies for public safety purposes).